

15 March 2019

Dear Mr Tibbitt

Thank you for your request for information under the Freedom of Information Scotland Act (FOISA) 2002 which we received on 12 February 2019.

You had requested information regarding the grant provided to North Banchory Company Ltd, please see a response to each of your questions below:

***Recent accounts published by the North Banchory Company Ltd suggest that it received a grant of £185,000 "towards the construction of the Banchory Business Centre," via Scottish Enterprise Grampian Ltd.***

***Please could you confirm whether this grant has been repaid in full, or not?***

Scottish Enterprise can confirm that the grant has not been repaid.

***If it has not, please confirm whether Scottish Enterprise is actively pursuing full repayment, or alternatively the reasons why anything less than full repayment has been agreed.***

This is a complex legacy project dating back to 2001, the terms of which were negotiated by the Local Enterprise Company, Scottish Enterprise Grampian Ltd. Due to the conditions associated with the grant and the time passed we are no longer pursuing any repayment.

***Additionally, please supply all recorded materials held by Scottish Enterprise that outline the purpose of the grant, the criteria for repayment, and any correspondence with representatives of the North Banchory Company Ltd about the grant.***

Please find attached email correspondence and documents between Scottish Enterprise and North Banchory Company Ltd about the grant. You will note some personal and commercial information has been redacted under Section 33(1)(b) and Section 38(1)(b) of FOISA 2002, details why are provided at the end of this letter.

***Lastly, please could you provide details of any recorded communications between Scottish Enterprise officials and Alexander Burnett MSP in regards to this grant, or the North Banchory Company?***

Under Section 17(1)(b) of FOISA 2002, Scottish Enterprise does not hold any recorded communications with Alexander Burnett MSP regarding the grant or the North Banchory Company.

If you have any further questions regarding this response and the associated documents, or indeed you intend to publish the information we have provided, we would be happy to discuss this further with you, please contact us at [pressoffice@scotent.co.uk](mailto:pressoffice@scotent.co.uk)

If you consider that your request has not been handled appropriately you have the right under the Freedom of Information (Scotland) Act 2002 to request a review.

A request for review must be submitted in writing or email within 40 working days of the date of this letter and should be addressed to:

Steve Dunlop  
Chief Executive

Atrium Court  
Scottish Enterprise  
50 Waterloo Street,  
Glasgow,  
G2 6HQ  
e-mail: [steve.dunlop@scotent.co.uk](mailto:steve.dunlop@scotent.co.uk)

It must include your name and an address for correspondence (e-mail address is acceptable) and specify the request for information to which the requirement for review relates and the matter which gives rise to your dissatisfaction with the decision. Scottish Enterprise will respond to any request for review within 20 working days of receipt.

#### **Your right to apply to the Information Commissioner under FOISA**

If you are dissatisfied with the outcome of the review you have the right under FOISA to apply to the Scottish Information Commissioner within six months following the date of receipt of the review notice.

Appeals can be made online at:

<http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>

If you do not wish to appeal online, you can appeal by post, or by e-mail. Details are below:

Office of the Scottish Information Commissioner  
Kinburn Castle,  
Doubledykes Road,  
St Andrews,  
Fife,  
KY16 9DS  
Email: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)  
Tel: 01334 464610

Please note that we will only process the personal data you have provided to respond to this request and in accordance with our privacy notice which can be found on our website: <https://www.scottish-enterprise.com/about-us/transparency/privacy-notice/how-we-use-your-information/enquiries>

Yours sincerely

Gail Gibson  
Scottish Enterprise

### Section 38(1)(b) - Personal Information

The exemption contained in section 38(1)(b) of FOISA has been applied to some of the withheld information you requested, in this case names, email addresses and contact details of Scottish Enterprise and North Banchory representatives.

Section 38(1)(b) together with Article 5(1) of the GDPR creates an exemption from disclosure where the information requested constitutes the personal data of a third party and disclosure of that data would breach any of the data protection principles set out in the Data Protection Act 2018 ("DPA"). Article 5(1) states that "personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject." As an absolute exemption, there is no need to consider the public interest in the application of this exemption.

Information has been withheld from you under this exemption in respect of names of individuals which constitutes as personal data. I am satisfied that the information that has been withheld constitutes the 'personal data' of the individuals concerned, as defined in section 1(1) of the DPA 2018.

SE has examined whether or not disclosure of the information you have requested, insofar as that is personal data, would breach the requirements of the first data protection principle.

### Fairness

In assessing whether release of the information would be fair, we have had regard to the Scottish Information Commissioner's Exemption Briefing Series on the section 38 exemption, and to guidance produced by the UK Information Commissioner, who has overall responsibility for data protection issues throughout the UK. In line with that guidance, and in coming to the decision to withhold personal data on the basis that it would be unfair to release it, we have taken into consideration:

- any potential damage or distress which may be caused by disclosure of the information;
- whether the information relates to the public or private life of the individual; and
- the expectations of the data subjects with regard to the release of the information.

Disclosure of the individuals' personal data into the public domain may cause them damage or distress. It would not be within the expectation of the individuals that their personal data would be put into the public domain under FOISA.

Release of the information would therefore be unfair and consequently would be in breach of the first data protection principle and therefore also unlawful. Given that the disclosure would be unfair, and therefore unlawful, in terms of not complying with the first data protection principle, it is not necessary to go on to consider any of the conditions in schedules 2 or 3 of the DPA 2018, or other aspects of lawfulness. The information must be withheld under section 38(1)(b) of FOISA, taken together with Article 5(1) of the GDPR.

#### Section 33(1)(b)- Commercial Interests

This section allows information to be withheld where its disclosure under the Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

Given this is legacy project and the grant was offered eighteen years ago, commercial interests have considerably diminished considerably over time. However, this exemption has been applied to a small section of the email correspondence as it relates to recent discussions with a third party regarding the site on the business park.

#### Harm Test – Substantial Prejudice

Release of this information would have the result of substantially prejudice the third party interested and its ability to compete against other businesses about whom similar information is not in the public domain. In my view, disclosure of the information would cause the companies real, significant and substantial prejudice.

#### The Public Interest Test

I recognise that there is a public interest in decision-making processes within public authorities being as open and transparent as is possible. I also recognise that making certain information available can increase the accountability of public authorities for decisions that are made that may have an impact on the wider public, and in particular the expenditure of public money by SE.

However, balanced against these considerations, there is also a public interest in ensuring that SE can protect its assessments of business opportunities in order to enable it to spend public funds as effectively as possible. I must also have regard to the public interest in protection of the privacy of any individual which would be diminished by the release of the requested information. I consider that there is no public interest or benefit in releasing information which could have an adverse effect on the commercial interests of third parties. However, allowing commercial parties to maintain confidentiality in their commercial positions for prospective commercial transactions is important to maintaining and supporting the proper and efficient operation of free markets, which is of serious concern and benefit to the public. As such I consider that the public interest also favours the withholding of this information.

On public interest grounds, I have therefore concluded that, in respect of the commercially sensitive information requested, the public interest is better served in withholding the information.